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# IN THE
# COURT OF APPEALS OF INDIANA

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| IN THE MATTER OF A.M., | ) | |
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| Appellant-Respondent, | ) | |
| | ) | |
| vs. | ) | No. 49A02-0701-JV-79 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Petitioner. | ) | |

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Geoffrey Gaither, Magistrate
Cause No. 49D09-0608-JD-2956

**November 28, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

A.M. appeals his adjudication as a delinquent child for committing an act that, if committed by an adult, would constitute Child Molesting,[1] as a class B felony. A.M. presents the following restated issues for review:

1. Did the State present sufficient evidence to support the adjudication?

2. Did A.M. receive ineffective assistance of trial counsel?

We affirm.

On the night of May 31, 2006, eight-year-old I.C. was in the front room of his home with sixteen-year-old A.M. and A.M.'s older cousin, Luis.[2] They were wrestling and watching a movie, while I.C.'s mother was upstairs. At some point, A.M. removed his belt and hung it on a nail near the television. While the three were sitting on the couch, with I.C. sitting in the middle, A.M. pulled his pants down and exposed his penis. Luis then put his hands on I.C.'s head and pushed it toward A.M.'s penis, and "[A.M.] made [I.C.] suck [his] ding a ling".[3] *Transcript* at 38. After about a minute, A.M. told I.C. to stop.[4] A.M. also proceeded to threaten I.C. that if he told what had happened he would not give him a toy.

At some point during this incident, I.C.'s mother, Ardenella Centeno, heard giggling and came downstairs. She observed that I.C., A.M., and Luis were on the couch,

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[1] Ind. Code Ann. § 35-42-4-3 (West 2004).

[2] Contrary to A.M.'s assertion on appeal, there is no indication in the record that Luis was I.C.'s mother's boyfriend.

[3] "Ding a ling" was a term I.C. used to mean penis. He also indicated that another name for this body part was "[p]rivate part." *Id*. at 40.

[4] The record reveals Luis may have also exposed his own penis and made I.C. perform oral sex on him.

and all three of them "jumped" when they saw her. *Id*. at 63. Centeno immediately directed I.C. to bed, and he complied without saying anything.

At a scheduled therapy session the following day,[5] I.C. reported what had happened with A.M. and Luis. Specifically, I.C. conveyed that A.M. "had asked him to kiss his private part the previous night" and that he had complied with the request. *Id*. at 69. The therapist, Emily Vaught, reported the allegation of abuse to child protective services.

Thereafter, on June 5, 2006, Lynette Garcia of the Child Advocacy Center interviewed I.C. about the incident. During this interview, I.C. indicated that he knew he was being interviewed because A.M. and Luis had shown him their private parts while they were downstairs at his house watching a movie. I.C. further stated that he was made to suck their private parts.

On August 2, 2006, the State filed a petition alleging A.M. was a delinquent child for committing acts that would constitute child molesting, as a class B felony, and child molesting, as a class C felony, if committed by an adult. Following a hearing on October 11, 2006, the trial court entered a true finding as to the class B felony allegation and a not true finding as to the class C felony allegation. A.M. was subsequently placed on probation with outpatient counseling. He now appeals.

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[5] The family had been receiving therapy and home-based counseling for some time. With respect to I.C., counselors were working with him to "process some of his behavioral difficulties from trauma from the past". *Id*. at 67.

1.

A.M. initially challenges the sufficiency of the evidence supporting the true finding. He claims I.C.'s testimony was incredibly dubious and, therefore, the child's credibility should be assessed on review and found wanting.

Our standard of review is well settled:

> We neither reweigh the evidence nor judge the credibility of witnesses. The State must prove beyond a reasonable doubt that the juvenile committed the charged offense. We examine only the evidence most favorable to the judgment along with all reasonable inferences to be drawn therefrom. We will affirm if there exists substantive evidence of probative value to establish every material element of the offense.

*K.D. v. State*, 754 N.E.2d 36, 38-39 (Ind. Ct. App. 2001) (citations omitted). "A victim's testimony, even if uncorroborated, is ordinarily sufficient to sustain a conviction for child molesting." *Bowles v. State*, 737 N.E.2d 1150, 1152 (Ind. 2000); *see also Carter v. State*, 754 N.E.2d 877, 880 (Ind. 2001) ("by its very nature child molestation often occurs without witnesses or physical evidence"), *cert. denied*.

With few exceptions, it is the trier of fact that decides whether a witness is to be believed. *See Carter v. State*, 754 N.E.2d 877. If a sole witness presents inherently improbable testimony and there is a complete lack of circumstantial evidence, however, we may apply the incredible dubiosity rule and impinge upon the trier of fact's function to judge the credibility of a witness. *Fajardo v. State*, 859 N.E.2d 1201 (Ind. 2007).

> This is appropriate only where the court has confronted inherently improbable testimony or coerced, equivocal, wholly uncorroborated testimony of incredible dubiosity. *Application of this rule is rare and the standard to be applied is whether the testimony is so incredibly dubious or inherently improbable that no reasonable person could believe it.*

*Id*. at 1208 (quoting *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002)) (emphasis supplied).

A.M. argues I.C.'s testimony was equivocal, evasive, contradictory, and internally inconsistent. A.M. notes that, at the hearing, the child initially denied he had ever touched A.M.'s penis. A.M. further asserts that only after I.C. was impeached by his prior statements did he "reluctantly…repeat anything approaching his prior accusations against A.M." *Appellant's Brief* at 7. Finally, A.M. argues the "striking inconsistencies" between his initial accusation in the counseling session, his interview with Garcia, and his testimony at the hearing "cast[] significant doubt on his accusations." *Id*.

Having reviewed the hearing transcript and exhibit, we find that the testimony of the eight-year-old witness, I.C., "was not so incredibly dubious or inherently improbable that no reasonable person could believe it." *Fajardo v. State*, 859 N.E.2d at 1209; *see also Carter v. State*, 754 N.E.2d 877 (a conviction for molestation can rest on the uncorroborated testimony of the victim even though there is equivocation or inconsistency in that testimony). While equivocations, uncertainties, and inconsistencies certainly appear, we find that they are not unusual to the circumstances presented and the age of the witness. *See Fajardo v. State*, 859 N.E.2d 1201. In particular, we do not find it especially remarkable that an eight-year-old victim, frightened while sitting in front of his sixteen-year-old molester, would initially deny the abuse.[6] Moreover, we cannot agree with A.M.'s insinuation that the State coerced I.C. into changing his testimony to correspond with his prior accusation against A.M.

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[6] At the hearing, I.C. initially testified A.M.'s penis was exposed but that A.M. did not make him do anything with it. After further questioning by the State, however, I.C. acknowledged that A.M. made him put his mouth on A.M.'s penis. I.C. also indicated that he was afraid while testifying against A.M.

I.C. ultimately testified unequivocally that he was made to place his mouth on A.M.'s exposed penis, and his testimony did not change on cross-examination. This allegation was consistent in relevant part with I.C.'s previous statements made only one day and approximately one week, respectively, after the night in question. Moreover, I.C.'s mother observed A.M. and Luis sitting on the couch with her son immediately following the alleged incident, and she indicated that they appeared startled upon seeing her come downstairs. Under the circumstances, we decline to invoke the incredible dubiosity rule to impinge on the trial court's evaluation of I.C.'s credibility.

A.M. further argues that even if I.C.'s testimony is credited, there is insufficient evidence because the sexual contact occurred only after Luis forcibly pushed I.C.'s head toward A.M.'s penis and his mouth remained on A.M.'s penis for only one minute until A.M. directed the child to stop. The evidence favorable to the judgment, however, reveals that A.M. exposed his penis while sitting next to I.C. on the couch and then "made [I.C.] suck [it]". *Transcript* at 38. We do not find the fact that Luis assisted in making I.C. perform oral sex particularly relevant. One could reasonably infer from the evidence that A.M. instructed the eight-year-old child to stop only because he heard the child's mother coming down the stairs. Moreover, we observe that A.M. threatened the child in an attempt to keep him from reporting the incident. Based upon the evidence favorable to the judgment, a reasonable trier of fact could have found that A.M. committed an act that would constitute class B felony child molesting if committed by an adult.

2.

A.M. claims he received ineffective assistance of trial counsel when counsel failed to attack the credibility of his accuser through cross-examination. In this regard, A.M. asserts that "cross-examination of key witnesses…would have revealed credibility-damaging details about I.C.'s psychological issues and home life as well as a plausible alternate explanation for the incident." *Appellant's Brief* at 12-13. The key witnesses to which A.M. refers appear to be I.C.'s therapist, Emily Vaught, and the family's home-based counselor, Joan Walker.

In order to prevail on his claim of ineffective assistance of counsel, A.M. must demonstrate both that his counsel's performance was deficient and that he was prejudiced thereby. *French v. State*, 778 N.E.2d 816 (Ind. 2002); *see also Taylor v. State*, 840 N.E.2d 324, 331 (Ind. 2006) (the failure to satisfy either component will cause an ineffective assistance of counsel claim to fail). Counsel's performance is deficient if it falls below an objective standard of reasonableness based on prevailing professional norms. *French v. State*, 778 N.E.2d 816. To establish the requisite prejudice, A.M. must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Smith v. State*, 765 N.E.2d 578, 585 (Ind. 2002).

> Counsel is afforded considerable discretion in choosing strategy and tactics, and we will accord those decisions deference. A strong presumption arises that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. We recognize that even the finest, most experienced criminal defense

> attorneys may not agree on the ideal strategy or the most effective way to represent a client. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective.

*Id*. (citations omitted).

In arguing that he received ineffective assistance of counsel, A.M. directs us to a sex offender evaluation performed by Jeff Brown just prior to the disposition hearing. In addition to concluding A.M. did not present a significant risk for sexual or delinquent recidivism, Brown appeared to question the true finding by the trial court by opining that I.C. "should not be seen as fully reliable." *Appendix* at 45. In this regard, Brown generally noted

> [t]he disparity between the stories, the plausibility of the alternate explanation for the incident,[7] the fact that mother was in the next room during the time the offense was alleged to have taken place, the questionable reliability of the victim's statement and the fact that the victim's behaviors and symptoms in question, predate the alleged offense.

*Id*. at 52. A.M. claims witnesses Vaught and Walker were "rich sources of detailed information that could and should have been explored to provide the court with the same information Jeff Brown used to reach his conclusion I.C. was unreliable as an accuser." *Appellant's Brief* at 13.

Our Supreme Court has observed, "the nature and extent of cross-examination is a matter of trial strategy delegated to trial counsel." *Osborne v. State*, 481 N.E.2d 376, 380 (Ind. 1985). In the instant case, A.M.'s trial counsel vigorously cross-examined I.C. and I.C.'s mother. The fact that counsel did not engage in extensive cross-examination of

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[7] Brown indicated in his report, "[A.M.] admits that he and his cousin did 'play a game' [that] involved sticking a finger out of their flies acting as if it was a penis." *Id*.

Vaught and Walker could well have been a strategic decision. *See Woods v. State*, 701 N.E.2d 1208, 1216 (Ind. 1998) ("[w]hen the only record on which a claim of ineffective assistance is based is the trial record, every indulgence will be given to the possibility that a seeming lapse or error by defense counsel was in fact a tactical move, flawed only in hindsight"), *cert. denied*.

Moreover, at this stage of the proceedings, we have no way of knowing what further cross-examination of these witnesses would have revealed. It is pure speculation on A.M.'s part that Vaught and Walker would have testified consistent with Brown's report, which was completed after the true finding. Further, there is no indication that these witnesses had any contact with A.M. or were even aware of his alleged "plausible alternate explanation for the incident." *Appellant's Brief* at 12-13 (footnote omitted). In sum, A.M. has wholly failed to establish his claim of ineffective assistance of trial counsel.

Judgment affirmed.

RILEY, J., and SHARPNACK, J., concur.